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10  
11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE DISTRICT OF ARIZONA**  
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14  
15 State of Arizona, *ex rel.* Kristin K. Mayes,  
Attorney General; et al.,

16 Plaintiffs,

17 v.  
18

19 Michael D. Lansky, L.L.C., dba Avid Telecom;  
et al.,

20 Defendants.  
21  
22  
23  
24

NO. 4:23-cv-00233-TUC-CKJ

**PLAINTIFFS' RESPONSE IN  
OPPOSITION TO  
DEFENDANTS' MOTION FOR  
ORDER PERMITTING  
HYBRID-FACT-EXPERT  
TESTIMONY BY MICHAEL D.  
LANSKY (DOC. 173)**

25 Plaintiffs respectfully file this Response in Opposition to Defendants' Motion for  
26 Order Permitting Hybrid-Fact-Expert Testimony by Michael D. Lansky (Doc. 173).

27 Defendants' Motion should be denied because Defendants do not demonstrate by a  
28 preponderance of the evidence that Defendant Lansky's proposed expert testimony meets  
the admissibility standards of Fed. R. Evid. 702. In the alternative, this Court should defer

1 its decision on Defendants' Motion until the close of expert discovery to allow Plaintiffs  
2 the time that they would otherwise have had to challenge an expert witness.

3 **I. This Court should deny Defendants' Motion as it fails on its face to meet the**  
4 **requirements of Fed. R. Evid. 702.**

5 First, Defendants' Motion fails to identify, let alone prove, Fed. R. Evid. 702's four  
6 requirements for the admission of expert testimony. Additionally, Defendant Lansky is a  
7 named party with an obvious financial stake in this matter. Because of this clear conflict of  
8 interest, his qualification as an expert would violate public policy. *IceMOS Tech. Corp. v.*  
9 *Omron Corp.*, No. CV-17-02575-PHX-JAT, 2019 U.S. Dist. LEXIS 168539, at \*24 (D.  
10 Ariz. Sept. 30, 2019) ("[A]n expert generally must be disqualified where the expert has a  
11 direct financial interest in the case beyond simply getting paid for rendering an expert  
12 opinion and testifying about it." (citation omitted)). Since Defendants' Motion fails to  
13 address the fundamental evidentiary and public policy concerns that would be implicated  
14 by Defendant Lansky's qualification as an expert, Defendants' Motion should be denied.

15 **a. Defendants fail to meet their burden of proof that Defendant Lansky's**  
16 **proposed expert testimony meets the four requirements of Fed. R. Evid.**  
17 **702.**

18 Rule 702 of the Federal Rules of Evidence requires that the proponent of expert  
19 testimony "demonstrate[] to the court that it is more likely than not that: (a) the expert's  
20 scientific, technical, or other specialized knowledge will help the trier of fact to understand  
21 the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts  
22 or data; (c) the testimony is the product of reliable principles and methods; and (d) the  
23 expert's opinion reflects a reliable application of the principles and methods to the facts of  
24 the case."

25 Defendants' Motion asks this Court to permit Defendant Lansky to offer expert  
26 testimony, but Defendants do not meet their burden of proof in establishing that Defendant  
27 Lansky is qualified as an expert. The section of Defendants' Motion purporting to show  
28 that Defendant Lansky qualifies as an expert witness under Fed. R. Evid. 702 consists of  
just six sentences. (Doc. 173, pgs. 6-7). The case that Defendants rely on to interpret Rule

702’s requirements, *United States v. Finley*, was decided in 2002 and thus does not discuss the current language of Rule 702, which has been amended twice since then, in 2011 and 2023. (Doc. 173, pg. 7).

A district court must exclude expert testimony unless the party offering it is able to prove all four Fed. R. Evid. 702 criteria by a preponderance of the evidence. *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1050 (9th Cir. 2025). The district court’s “gatekeeping role” regarding the admissibility of expert testimony under Rule 702 was established by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). Specifically, trial judges are tasked with “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Id.* A district court abuses its discretion if it abandons this gatekeeping role by admitting expert testimony without first finding it to be relevant and reliable. *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1189 (9th Cir. 2019). Defendants have failed to provide any independent evidence as to why Defendant Lansky meets the requirements of Fed. R. Evid. 702.

**b. Defendants fail to address the inherent conflict of Defendant Lansky being both a party in the case and an expert witness.**

The district court’s gatekeeping obligation with regards to expert testimony is grounded in a desire to preserve “intellectual rigor.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). But when an expert witness has a direct financial interest in the outcome of the litigation, “any semblance of independence or promise of intellectual rigor that normally adheres to an expert witness is fatally wounded.”<sup>1</sup> *Perfect 10 v. Giganews, Inc.*, No. CV 11-07098-AB (SHx), 2014 U.S. Dist. LEXIS 185066, at \*12 (C.D. Cal. Oct. 31, 2014).

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<sup>1</sup> Defendant Lansky appears to agree that the credibility of experts who have a “direct financial interest” in the case is suspect. In the Proposed Expert Report, Defendant Lansky mischaracterizes the commercial services of YouMail, one of Plaintiffs’ experts, and attempts to attack YouMail with the incorrect and unsupported claim that such services result in YouMail having “a direct financial interest in maximizing the scale of illegal robocalling.” (Doc. 174, pg. 3).

1       The conflict of interest inherent in a defendant serving as his own expert witness is  
2 comparable to that of an expert witness receiving compensation pursuant to a contingent  
3 fee agreement. In both situations, the proposed expert has a direct financial stake in the  
4 outcome of the litigation. And in both situations, courts have found that public policy  
5 requires the exclusion of the challenged expert, as the risk of witness bias would be too  
6 great if the expert were permitted to testify. *See Accrued Fin. Svcs., Inc. v. Prime Retail,*  
7 *Inc.*, 298 F.3d 291 (4th Cir. 2002); *Perfect 10*, 2014 U.S. Dist. LEXIS 185066, at \*19.

8       In *Perfect 10*, when presented with the proposed expert testimony of a party (the  
9 plaintiff corporation's sole shareholder), the court found that a "direct financial stake  
10 provides too great a temptation to practice deceit and to commit the too common crime of  
11 perjury." 2014 U.S. Dist. LEXIS 185066, at \*17 (internal quotations and citation omitted).  
12 Using its inherent power to disqualify expert witnesses "to protect the integrity of the  
13 adversary process and promote public confidence in the legal system," the court did not  
14 permit the plaintiff-sole shareholder to testify as an expert. *Id.* at \*17-18 (internal  
15 quotations and citation omitted). The *Perfect 10* holding has been adopted by district courts  
16 that have been presented with an expert witness with a direct financial stake in the  
17 litigation, including a party who attempts to testify as its own expert. *See IceMOS Tech*  
18 *Corp.*, 2019 U.S. Dist. LEXIS 168539, at \*24 (citing the *Perfect 10* holding as a general  
19 rule); *SEC v. Cornerstone Acquisition & Mgmt. Co. LLC*, No. 22-CV-765 JLS (VET), 2025  
20 U.S. Dist. LEXIS 12419, at \*57-58 (S.D. Cal. Jan. 23, 2025) (prohibiting two party  
21 defendants from testifying as experts); *Calfox, Inc. v. Certain Underwriters at Lloyd's*, No.  
22 20-CV-02443-RM-KMT, 2024 U.S. Dist. LEXIS 42483, at \*30-32 (D. Colo. March 11,  
23 2024) (prohibiting a proposed expert from testifying when he was employed by a public  
24 adjuster firm that was employed by the plaintiff on a contingency basis).

25       Plaintiffs' Complaint alleges that Defendant Lansky is liable for at least millions of  
26 dollars in statutory damages and civil penalties due to his role in facilitating the  
27 transmission of billions of illegal robocalls. Aside from Lansky's co-defendants, no one  
28 has a more direct financial interest in the outcome of this litigation. Lansky's direct and

1 staggering financial interest in this litigation creates too great a temptation to provide false  
2 testimony; public policy thus demands that he not be permitted to testify as an expert.

3 This Court holds the gatekeeping authority described in *Daubert* and its progeny  
4 and the inherent power to make necessary evidentiary rulings concerning expert testimony  
5 to ensure a fair trial. Defendants' Motion fails to meet the burden of proof required for the  
6 admission of expert testimony, and Defendant Lansky has a conflict of interest from his  
7 direct financial interest in the outcome of this litigation. Thus, this Court should exercise  
8 its gatekeeping authority and deny Defendant's Motion for Order Permitting Hybrid-Fact-  
9 Expert Testimony by Michael D. Lansky (Doc. 173).

10 **II. In the alternative, fairness requires this Court to defer deciding Defendants'**  
11 **Motion until the close of expert discovery.**

12 A party seeking to challenge the qualification of an opposing party's expert typically  
13 does so through a specific type of motion in limine, a *Daubert* motion. A *Daubert* motion  
14 is a comprehensive challenge to the admissibility of expert testimony on grounds such as  
15 inadequate expertise, questionable methodology, or unsupported conclusions. It is typically  
16 filed after the close of expert discovery, when the parties have obtained sufficient  
17 information to assess the opposing expert's qualifications and methodology.

18 By filing their Motion for Order Permitting Hybrid-Fact-Expert Testimony,  
19 Defendants are asking this Court to preclude Plaintiffs from later filing a *Daubert* motion.  
20 But expert discovery in this case is still ongoing; Plaintiffs' rebuttal expert testimony has  
21 not been served, nor have any expert depositions taken place. Plaintiffs intend to bring a  
22 detailed challenge to Defendant Lansky's proposed expert testimony at a time permitted  
23 under the current Scheduling Order.

24 Defendants' Motion unfairly deprives Plaintiffs of the opportunity to bring a  
25 meaningful challenge to Defendants' expert witness by limiting Plaintiffs' ability to gather  
26 facts through expert discovery before bringing such a challenge. Accordingly, if the Court  
27 is not now inclined to deny Defendants' Motion, Plaintiffs request that it defer its ruling  
28 until after the close of expert discovery. A deferred ruling would simply keep this litigation  
on the standard timetable for challenges to expert witnesses.

### III. Conclusion

Defendants' Motion does not make more than a passing effort to argue that this Court should qualify Defendant Lansky as an expert. Defendants have not proven that Defendant Lansky's proposed expert testimony meets Fed. R. Evid. 702's requirements, and thus Rule 702 requires this Court to act in its gatekeeping role to disqualify Lansky as an expert. And because Defendant Lansky has a direct financial interest in the outcome of this litigation, public policy demands that this Court exercise its inherent evidentiary power by excluding Lansky's expert testimony. Accordingly, Plaintiffs respectfully request that this Court deny Defendants' Motion for Order Permitting Hybrid-Fact-Expert Testimony by Michael D. Lansky (Doc. 173).

In the alternative, Plaintiffs respectfully request that this Court defer deciding Defendants' Motion until after the close of expert discovery, to allow Plaintiffs the time that they would otherwise have had to challenge an opposing party's expert.

RESPECTFULLY SUBMITTED this 12th day of November, 2025.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 2025, I caused the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR ORDER PERMITTING HYBRID-FACT-EXPERT TESTIMONY BY MICHAEL D. LANSKY (DOC. 173)** to be filed and served electronically via the Court's CM/ECF system upon counsel of record.

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